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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: BALTIMORE, MD

Date: JUN 21 2004

IN RE:

Applicant:

APPLICATION:

Application for Waiver of of the Foreign Residence Requirement under Section 212(e)
of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of Nepal. She is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e), because she participated in an exchange program financed by the United States (U.S.) government for the purpose of promoting international, educational and cultural exchange, and because the Director, Waiver Review Division (WRD), U.S. State Department Visa Office has designated Nepal as requiring the services of persons with the applicant's specialized knowledge or skill.

The record reflects that the applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on August 13, 1996, to pursue a graduate education program in journalism. Upon completion of her exchange program the applicant obtained an I-1 non-immigrant visa, and on December 20, 1999, the applicant married a U.S. citizen. The applicant's Petition for Alien Relative was approved by Citizenship and Immigration Services (CIS) on May 9, 2002. The applicant presently seeks a waiver of her two-year residence requirement in Nepal, based on the claim that her U.S. citizen husband will suffer exceptional hardship if he is separated from the applicant for two years, or if he temporarily moves with the applicant to Nepal.

The acting district director (ADD) determined the applicant had failed to demonstrate that her husband (Mr. [REDACTED]) would suffer exceptional hardship if she were required to fulfill her two-year residency requirement in Nepal. The application was denied accordingly.

On appeal, counsel asserts that the ADD erred in making an exceptional hardship determination in the applicant's case without first requesting an advisory opinion from the U.S. Department of State. Counsel asserts further that medical and financial evidence contained in the record establishes that [REDACTED] would suffer exceptional emotional, physical and financial hardship if his wife had to return to Nepal for two years.

The AAO is unpersuaded by counsel's assertion that the ADD was required to obtain a U.S. Department of State advisory opinion prior to making an exceptional hardship determination in the applicant's case. Although court cases establish that the ADD cannot waive a two-year residence abroad requirement without first obtaining a favorable recommendation on the waiver from the United States Information Agency (USIA), (now, WRD), the ADD is not prohibited from independently making an exceptional hardship determination and denying a section 212(e) waiver prior to obtaining a recommendation from the WRD. See *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970). See also *Dina v. Attorney General of the United States*, 793 F.2d 473, (2nd Cir. 1986) (discussing Attorney General (now Secretary, Homeland Security) authority to make an extreme hardship finding in section 212(e) cases, and the subsequent requirement of obtaining a favorable recommendation from the USIA (WRD) prior to being able to grant the waiver) and *Chong v. USIA*, 821 F.2d 171, 176 (3rd Cir. 1987) (stating that the USIA (WRD) role "is to determine the policy, program, and foreign relations aspects of a case, weigh them against the hardship determined by the INS (CIS) and make a favorable recommendation for waiver if the hardship clearly outweighs the other aspects").

Section 212(e) of the Act states in pertinent part that:

(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission¹

(i) whose participation in the program for which he came to the United States as financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,

(ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [CIS] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General

¹ Section 101(a)(15)(J) of the Act, 8 U.S.C. § 1101(a)(15)(J) states, in pertinent part, that:

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

....

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j), and the alien spouse and minor children of any such alien if accompanying him or following to join him.

[Secretary] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Counsel asserts that the evidence contained in the record clearly establishes that the applicant's temporary departure from the United States would impose exceptional hardship upon her U.S. citizen spouse.

The AAO notes that the record contains letters from the applicant and her husband asserting that if the applicant were required to reside in Nepal for two years, [REDACTED] would suffer hardship related to his worries about whether the applicant would find adequate medical care for her Lupus condition. The letters state [REDACTED] would also worry about the applicant's safety in Nepal because many journalists (his wife's profession) have been jailed there. The applicant and her husband state further that [REDACTED] suffers severe panic attacks at the thought of flying and that he would most likely be unable to fly to Nepal either to live with the applicant or to visit her there. The letters also state that [REDACTED] suffers severe anxiety regarding his own safety in Nepal, because Department of State Consular reports (included in record) have indicated that Maoist rebels target and perpetrate violence against Americans.

In addition to the above concerns, [REDACTED]'s letter reflects his worries about reports (contained in record) that there are few mental health resources and doctors in Nepal, and that people with mental disabilities are ostracized and sometimes placed in jail. The applicant and her husband indicate in their letters, that Mr. [REDACTED] suffered severe stress and anxiety requiring medical treatment, when he was separated from a past girlfriend who traveled abroad in the 1980s. The letters, and [REDACTED] work-related documentation, reflect that as a result of the previous separation from his ex-girlfriend [REDACTED] was almost fired from his job based on his mental and emotional attitude. The record additionally reflects [REDACTED] concern that he would be unable to regain his present job if he moved to Nepal for two years and that he would lose his current health insurance, which covers his psychological therapy and treatment.

The record contains the following medical evidence relating to [REDACTED] mental condition and his exceptional hardship claim:

- A September 20, 2000, letter from [REDACTED] Ph.D., Licensed Clinical Psychologist, stating that he held weekly individual psychotherapy sessions with Mr. [REDACTED] from February 1995 through February 1998. The letter states that [REDACTED] suffers from severe Obsessive Compulsive Disorder (DSMIV: 300.3), and that:

In addition to this primary diagnosis, with its attendant depression and anxiety of major proportions, [REDACTED] also experienced insomnia, a number of specific

phobias, and panic attacks, especially in the context of anticipating a separation from his then current girlfriend. This constellation of symptoms combined to produce a major disruption in his occupational and social functioning.

The letter states that [REDACTED] disorder did not yield to conventional psychotherapy, and that Mr. [REDACTED] was referred to [REDACTED] who prescribed Prozac and Buspar, in April 1996. The letter states that [REDACTED] anxiety and related symptoms improved only slightly, if at all" and the letter concludes that [REDACTED] has no doubt that [REDACTED] "[w]ould be in danger of a precipitous deterioration if he were severely stressed, as he would be if separated from his wife, or displaced from his home and exposed to the hardships of life in Nepal."

- A September 24, 2000, Psychological Evaluation of [REDACTED] by [REDACTED] Ph.D., Clinical Psychologist, stating that [REDACTED] began suffering depression in May 1986 and obsessive-compulsive disorder (OCD) in July 1988. The report states that many of [REDACTED] fears center on, "fears of contamination, disease, accident, death, and abandonment." The report states further that, [REDACTED] has developed a strong emotional attachment to his wife and is psychologically dependent upon her for his personal security, sense of belonging, and well being." The report concludes, amongst other things, that a separation between [REDACTED] and his wife "[w]ould precipitate a mental crisis followed by a breakdown in [REDACTED] ability to cope with work demands, personal business affairs, and self-care."

- A May 15, 2001, letter from [REDACTED] M.D. (Associate Clinical Professor of Psychiatry and [REDACTED] Diplomate of the American Board of Psychiatry and Neurology), stating that [REDACTED] has been under his continuous care since April, 1996, for the treatment of a chronic and severe medical disorder, and that he sees Mr. [REDACTED] for regular office visits every one to three months with occasional telephone consultations. The letter states that, [REDACTED] suffers primarily from severe Obsessive-compulsive Disorder (OCD), as well as a group of related syndromes that frequently cluster with OCD: major depressive symptoms, insomnia, panic attacks, specific phobias, and separation anxiety." The letter states further that, "[t]he severity and complexity of [REDACTED] condition has required and will continue to require, the sophisticated management of a combination of several advanced psychotropic medications, with dosage adjustments and changes in regimen as needed." The letter concludes that, "[a]ny significant disruption of [REDACTED] current living situation and medical treatment arrangements would severely aggravate his psychiatric disorder." The letter states further that, "[i]f [REDACTED] were to be separated from his wife for any significant time, it is likely that his symptoms and dysfunction would markedly worsen causing him extreme psychological and emotional hardship."

- A March 12, 2002, letter from [REDACTED] noting a significant worsening in Mr. [REDACTED] clinical condition resulting from the February 2002 denial of his wife's waiver application, and recommending for medically compelling reasons, that Mr. [REDACTED] wife's application be granted.

- A March 18, 2002, letter from [REDACTED] licensed Psychologist, stating that Mr. [REDACTED] has attended weekly psychotherapy sessions with him since October 5, 2001 for OCD and major depression. The letter states that:

_____ suffers from multiple anxieties that have been at times crippling. The support from his wife has been essential in allowing _____ to continue his vocational and social functioning. Her absence for a 2-year period is likely to drastically reduce _____ capacity to work and function on a daily basis. In addition, _____ OCD concerns his ability to ensure his wife's safety clearly her departure would greatly exacerbate his concerns and overall psychological functioning. Moreover _____ flying phobia would make it extremely difficult for him to manage visits to and from Nepal.

In addition, the letter states that _____ psychological functioning would suffer if he accompanied his wife to Nepal because treatment for OCD is highly specialized and requires trained clinicians, and because there are few mental health resources in Nepal

- A December 15, 2002, letter from _____ President, National Alliance for the Mentally Ill (NAMI), Montgomery County, stating that, "[t]he conditions from which _____ suffers - anxiety, disorders and depression - are serious and require a combination of medication and psychotherapy."

- A December 15, 2002, letter from _____, stating that:

_____ suffers from two major mental illnesses, which often occur together: Obsessive-compulsive disorder and Major depressive disorder. These are not trivial conditions, and constitute a major source of severe dysfunction, morbidity and mortality

_____ obsessive and compulsive symptoms, center around extreme fears of loss, loss of control, and severe separation anxiety

....
I also have no doubt that were _____ to be separated for any significant time, _____ would suffer a severe worsening of his disorder that could render him unable to function and could be life-threatening.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[t]emporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e)".

In *Huck v. Attorney General of the U.S.*, 676 F. Supp. 10 (D.D.C. 1987) the U.S. District Court, District of Columbia, additionally stated that:

Courts have recognized that the "exceptional hardship" standard must be stringently construed lest the waiver exception swallow the salutary two-year residence rule Forceful application of the standard also guards against attempts by applicants to manufacture hardship in order to come within its terms. (Citations omitted).

The District Court stated further that the Immigration and Naturalization Service (INS, now CIS) must consider the totality of circumstances when making a 212(e) waiver exceptional hardship determination. *Id.*

(citing *Slyper v. Attorney General*, 576 F.Supp. 559, 560 (D.D.C. 1983) and *Ramos v. INS*, 695 F.2d 181, 189 (5th Cir. 1983)). The AAO finds that the totality of the evidence in the present case establishes that Mr. Torrini would suffer exceptional hardship if his wife were required to return to Nepal for two years.

The AAO finds that the evidence in the record reflects that [REDACTED] mental condition has not been fabricated for purposes of the present waiver application. The record reflects that [REDACTED] has required medical treatment for his psychological condition since at least 1986. The record reflects further that fears of being separated from significant partners in his life have caused [REDACTED] to detrimentally suffer increased psychological and emotional symptoms. The AAO finds that the evidence in the record establishes that Mr. [REDACTED] would be unable to obtain adequate medical treatment for his condition in Nepal. The evidence reflects further that [REDACTED] would likely suffer panic attacks if he tried to fly in an airplane to Nepal. The record also reflects that [REDACTED] would lose his present income and U.S. medical coverage if he left his present job and moved to Nepal to be with his wife. Moreover, the AAO finds that the medical evidence contained in the record establishes that the hardship [REDACTED] would suffer if he remained in the U.S. for two years without the applicant would go significantly beyond that normally suffered upon the temporary separation of two spouses.

The burden of proving eligibility for a waiver under section 212(e) of the Act, rests with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has met her burden. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be returned to the ADD so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD recommends that the application be approved, the application must be approved. If, however, the WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is returned to the acting district director for further action consistent with this decision.